

HERIBERTO VILLARREAL

v.

DEPARTMENT OF TREASURY

DOCKET No.

DA07528110548

OPINION AND ORDER

Appellant, a Customs Warehouse Officer with the Department of the Treasury, United States Customs Service, Laredo, Texas, was indefinitely suspended pending the outcome of criminal proceedings on charges for which he had been indicted. At the time he filed his appeal, he also filed a motion that his appeal be dismissed without prejudice pending resolution of the criminal charges and that he be allowed to reinstate it within twenty (20) days from the final adjudication of the criminal action. The presiding official granted the motion because he found that a defense against the agency action might require disclosure of evidence harmful to his criminal defense and thus violate appellant's due process. Therefore, he dismissed the appeal without prejudice to appellant's right to refile within twenty days following final disposition of the criminal charges against him.

The agency, in its petition for review, contends that there would be no denial of due process to proceed with consideration of the appeal from the indefinite suspension as the merits of the criminal charge itself would not need to be examined. The agency argues that the indefinite suspension is based upon the presence of a reasonable cause to believe that appellant had committed a crime for which a sentence of imprisonment may be imposed. Thus, in an appeal from the suspension, the only issue before the Board would be "reasonable cause," not the merits of the criminal charge.

In his response, appellant requests that the petition for review be dismissed as moot. His reasons for this request are: the time for refiling had lapsed before the petition for review had been filed, and further, appellant is no longer an interested party because he has resigned. The agency knew both these facts before filing its petition. Therefore, appellant argues that the Board's decision on the propriety of the indefinite suspension under these circumstances would constitute an advisory opinion.

According to the facts given by appellant's representative and not rebutted by the agency, appellant, on August 26, 1981, informed his representative that he had resigned from the agency and pleaded guilty to a charge in return for a recommendation of probation. The representative informed the agency of these facts on the same day and also told an agency representative that appellant was not going

to refile his petition for appeal from the indefinite suspension.¹ Assuming August 26 is the day that the criminal charges against appellant were finalized by his guilty plea,² his date for refiling his petition would have expired September 15. The agency filed its petition for review on September 28 after the expiration date for refiling and with full knowledge of the appellant's resignation, guilty plea and intention not to refile.

Given this set of facts, a Board opinion on the initial decision would have no effect on the parties in question. Appellant waived his right to refile his petition for appeal from the suspension, which was granted by the initial decision.

The relief sought by the agency, the reversal of the motion granting appellant the right to refile, has been rendered moot by appellant's own action. Thus, any decision by the Board on the correctness or incorrectness of the motion would be akin to an advisory opinion, which the Board cannot issue. 5 U.S.C. § 1205(g).

Accordingly, the petition for review is **DISMISSED**.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 19, 1982*

¹Appellant's representative attested to these facts in an affidavit, dated November 6, 1981, which was submitted with the response.

²Presumably, the actual date was sometime earlier as August 26 was the day when he informed his representative in his action against the agency of his plea.